it maintains that "'serving' an area does not merely entail delivering traffic to a few customers located within that area, no matter how large it may be."[79] It may be significant in this regard that AT&T refers to the FCC's standard not as "functional equivalence," which it attributes only to our Framework Order, but as "geographic equivalence," perhaps intending in this way to counter Bell Atlantic-New York's multi-faceted view (comprising nature of service as well as geography) of functional equivalence.

Recognizing that start-up CLECs will use fewer switches and an extended loop distribution architecture as the functional equivalent of a mature ILEC network using tandemr, Bell Atlantic-New York nevertheless contrasts a start-up CLEC intending to be a full service provider with one targeting large volume convergent customers. It asserts that the former will necessarily install more extensive and less efficiently used facilities and will eventually be required to install tandem switching as its network begins to resemble that of a mature ILEC: the niche player, in contrast, will not be required to make these investments. And even if the niche player changed its strategy and began to seek a general customer base, the portion of its network designed to serve convergent customers would remain more efficient.

Further reducing the cost of serving large-volume convergent customers, Bell Atlantic-New York argues, is the ability to use shorter connections between the CLEC switch and the customer, perhaps even reducing that distance to zero through collocation.

To translate the foregoing analysis into rates, Bell Atlantic-New York would use traffic ratios as a measure of functional equivalence: a high ratio would be taken to imply that the CLEC was serving a high proportion of convergent customers; a ratio close to one would suggest that the CLEC, like Bell Atlantic-New York, itself, was serving a

[79] Bell Atlantic-New York's Reply Brief, pp. 12-13.

representative distribution of customers. It proposes a ratio of 2:1 as the dividing line: Meet Point A (end-office) rates would apply where the ratio was 2:1 or greater: Meet Point B (tandem) rates would apply only where the ratio was less than 2:1. The proposal would apply to all types of convergent traffic, not merely that directed to the Internet. In Bell Atlantic-New York's view, reference to the traffic imbalance is reasonable because such an unbalance can arise only if one carrier is serving customers that receive more traffic than they originate; and it entails little administrative cost, since traffic flows in each direction are already billed. It regards the 2:1 threshold as generous, since, in principle, it would be reasonable to charge the lower rate for all traffic in excess of a 1:1 ratio.[80]

Finally, Bell Atlantic-New York denies that its proposal unfairly penalizes CLECs; it applies, it says, not to particular carriers but to particular traffic. A CLEC serving that type of traffic would receive the end-office rate; a CLEC serving a broader and more dispersed group of customers might receive the tandem rate. Bell Atlantic-New York characterizes its proposal not as a penalty imposed on CLECs that focus their efforts on ISP customers, but as a means of insuring that they are not rewarded by being over compensated for their efforts.

As already suggested, CLECs take the position that Bell Atlantic-New York's understanding of functional equivalence violates the FCC's rule. CTSI et al., for example, dispute the premise that a CLEC could receive the tandem rate only if it served thousands of customers within the pertinent geographic area. They assert that "if a CLEC has facilities in place that provide tandem switch functionality capable of serving many customers in a geographic area comparable to that served by [Bell Atlantic-New York's] tandem switch, that is sufficient. Nothing more

[80] Bell Atlantic-New York's Reply Brief, p. 17.

is required under the FCC's test."[81] In addition, they complain Bell Atlantic-New York is proposing to charge CLECs different rates on the basis of the types of customers they serve, contrary to Ehe FCC's rules.[82] Lightpath maintains the efficiencies CLECs allegedly enjoy on account of serving a small number of large customers have no application to full service providers, whose networks are built to serve a wide customer base, even if they serve ISPs as Well.[83] Global NAPs, meanwhile, maintains that the number of customers served by the CLEC has no bearing on whether it meets the functional equivalence standard. Beyond that, it contends a CLEC can "serve" a wide geographic area by allowing its customers to collocate with it, even without constructing a fiber network traversing the area: "a CLEC may 'serve' a wide geographic area. . . by incurring the costs associated with allowing its customers that need to receive calls from such an area to collocate at [its] switch, by incurring the costs associated with deploying physical facilities to customer locations in different local calling areas throughout the LATA, or some combination of both."[84] It warns against penalizing the smallest and newest CLECs or motivating them to sign up a handful of customers in diverse locations merely to qualify for the tandem rate.

CLECs also challenge Bell Atlantic-New York's use of a 2:1 ratio as the demarcation point between the two rates, claiming it has shown no link between that traffic ratio and a CLECs termination costs. CTSI et al. cite a Maryland proceeding in which Bell Atlantic-Maryland's counsel acknowledged the ratio was "arbitrary."[85] Lightpath similarly

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[81] CTSI et al.'s Reply Brief, p. 9.

[82] 47 C.F.R. §51.503(c).

[83] Lightpath's Reply Brief, pp. 4-5.

[84] Global NAPs' Reply Brief, p. 14.

[85] CTSI et al.'s Reply Brief, p, *1*, citing Complaint of MFS

sees no factual support for the 2:1 ratio, disputing what it characterizes as Bell Atlantic-New York's view that "the interests of full-service, facilities-based CLECs are accommodated by its ratio approach."[85] It reiterates the claim that its switches serve an area at least as large as that served by a typical Bell Atlantic-New York tandem and that Bell Atlantic-New York can reach all its customers through a single point of interconnection; it therefore sees itself as meeting our test of tandem functionality as well as the FCC's, regardless of its traffic ratio.

Finally, MCIW pursues a somewhat different line of reasoning, arguing that Bell Atlantic-New York's proposal would, in effect, improperly force CLECs to install tandem switches and build inefficient networks simply to satisfy Bell Atlantic-New York's requirements.

3. ISP Traffic

Given the flexibility afforded the states by the FCC's determination that Internet traffic is exempt from reciprocal compensation, Bell Atlantic-New York argues that we would be justified in setting compensation for that traffic at zero. It cites in this regard the Massachusetts decision, noted above, that declined to mandate payment of reciprocal compensation for Internet traffic and left it to the parties to negotiate their own arrangements; it asserts that the New Jersey Commission recently reached a similar conclusion. Should we decline to take so drastic a step, Bell Atlantic-New York would recommend a rate equal to what it terms "direct variable costs."

In support of its zero-compensation proposal, Bell Atlantic-New York contends that, in principle, ISPs are interstate carriers who should pay carrier access charges.

Intelcnet of Maryland Against Bell Atlantic of Maryland, Case No. 8731, Hearing Proceedings (April 14, 1999) Tr. 167-168.

[86] Lightpath's Reply Brief, p. 6.

Because the FCC has exempted them from access charges, however, both the originating and terminating LECs are undercompensated. Asserting, with illustrations, that Bell Atlantic-New York's revenues from its customers who place calls to ISPs tend to be below cost, it argues that requiring it to pay intercarrier compensation to the terminating carrier makes a bad situation worse and requires "ILECs [to] remit to CLECs revenues that they never receive";[87] it would be bettmr' in its view "for the Commission to restrict both LECs to the local exchange revenues each receives from its customer (in the case of the originating LEC, the local charges the Internet user pays; in the case of the LEC delivering the call to the ISP, the local charge the ISP pays). This proposal is competitively neutral as between the two involved LECs."[88] Bell Atlantic-New York regards a zero rate as further justified by the abusive tactics of those CLECs using ISP traffic to generate reciprocal compensation revenue streams, as discussed earlier. Noting the claim that CLECs' termination of calls enables ILECs to avoid tho cost of termination, Bell Atlantic-New York contends that intercarrier compensation is not based on avoided costs; it is designed to compensate the terminating carrier *for* the costs it incurs.

Bell Atlantic-New York's alternative proposal for ISP traffic would take the current Meet Point A and Meet Point B rate levels (reduced to eliminate vertical feature costs in accordance with its first proposal) and adjust them to remove investment costs (depreciation and return) and joint and common costs, all of which are included in the TELRIC analysis that forms the basis for the existing rates. (It denies such rates would be confiscatory, inasmuch as the CLEC could recover its costs from its ISP customer.) The precise rate levels would be determined in the Second Network Elements

[87] Bell Atlantic-New York's Reply Brief, p. 20.

[88] Bell Atlantic-New York's Initial Brief, p. 36 (emphasis in original).

Proceeding, but Bell Atlantic-New York suggests interim rates based on the record of the First Network Elements Proceeding.

Noting that CLECs have argued that reduced compensation rates for Internet traffic would deter Internet growth, Bell Atlantic-New York asserts that ISPs already benefit from their exemption from interstate access charges, and it cites the Massachusetts Commission's observations that the Internet is powerful enough to stand on its own and that eliminating the subsidies produced by regulatory distortion would encourage efficient investment in Internet and other technology.

Administering these proposals would require a means to identify Internet traffic, and Bell Atlantic-New York, consistent with its view of burden *of* proof in this case, would impose the burden of identifying the traffic on the CLEC. In the absence of a showing by the CLEC, Bell Atlantic-New York would presume all convergent traffic (i.e., all traffic in excess of its proposed 2:1 ratio discussed in the previous section) to be Internet traffic.

CLECs press various arguments in response. e.spire/Intermedia dispute the premise that states are free to set below-TELRIC rates for ISP traffic, contending that the FCC ISP Ruling granted them, until a final federal rule is promulgated, only "the authority under section 252 of the [1996] Act to determine intercarrier compensation rates for ISP-bound traffic."[1] In its view, the reference to §252 requires TELRIC-based rates for ISP traffic. CTSI et al. and Global NAPs dispute Bell Atlantic-New York's reference to the Massachusetts ISP decision, the former noting that the portions it relies on are disputed dicta and the latter citing the many states that, in contrast to Massachusetts (and, more recently Now Jersey), have held ISPs to be no different from other calls with regard to reciprocal cornpensation. CTSI et al also note the FCC's statement in its ISP ruling that CLECs

[1] e.spire/Intermedia's Initial Brief, p. 11, citing the FCC ISP Ruling, (125 (emphasis supplied).

incur costs to deliver ISP traffic and that some compensation is warranted to enable them to recover those costs.[90]

Global NAPs disputes the relevance of Bell Atlantic-New York's allegations that it fails to recover its Costa of originating ISP-bound calls, arguing that they are no different in this regard from all other local calls with longer-than-average holding times. In its view, the only pertinent question is whether local calling revenues overall suffice to recover the costs of local calling; it charges that Bell Atlantic-New York would have "CLECs . . . made into indentured servants for Bell Atlantic-New York's end-users who, after all, are the source of both the costs and the revenues at issue here."[91] (Bell Atlantic-New York maintains, however, that it3 local calling rates were set before the advent of the Internet and are now capped under its Performance Regulation Plan.) Global NAPs argues as well that if all CLECs that served ISP customers disappeared, Bell Atlantic-New York's costs would increase by more than it would save by avoiding reciprocal compensation payments, for it would have to augment its own network to complete the calls directed to ISPs. Bell Atlantic-New York's proposal thcrefore

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[90] FCC ISP Ruling, ¶29.

[91] Global NAPs' Reply Brief, p. 15. Global NAPs supports reciprocal compensation in part on the premise that local calling as "sent paid," that is, the originating carrier is to collect from the end-user revenues adequate to deliver the call to its destination. If a different carrier terminates that call, those revenues should be shared so the terminating carrier can recover its costs. (Global NAPs' Initial Brief, pp. 3-4.) BA takes the view that any such sharing, if applied pro rata (on the basis of each carrier's costs) to existing originating revenues would produce reciprocal compensation payments below current end-office rates. It therefore regards Global NAPs reasoning as suggesting a remedy that, while not a subrtitute for its own proposal, "at least would eliminate the absurd and anti-competitive requirement that originating ILECs remit to CLECs revenues that they never receive and that are below the originating ILECs' costs." (Bell Atlantic-New York's Reply Brief. p. 20.)

would grant Bell Atlantic-New York a windfall by permitting it to continue to avoid those costs while freeing it of any (or most) of its reciprocal compensation obligation.

Finally, the Attorney General asserts that by entering the market for ISP-bound traffic, CLECs have contributed to the greater availability of Internet access to end-users. He suggests that "changing or abandoning reciprocal compensation for ISP-bound traffic could have the detrimental effect of limiting consumer choice in securing ineernet access, and increasing the price of such service, which in turn might limit the number of New York consumers who can avail themselves of internet access. The Commission should avoid this result."[92]

[92] Attorney General's Reply Brief, p. 6.

4. Geographically Relevant Interconnection Points

ISPs often ask their local exchange carriers to assign them "virtual local numbers," i.e., numbers associated with each of the local calling areas in which their customers might be located regardless of whether the ISP itself or the carrier serving it has facilities in those areas. The ISPs do so to make it convenient and cheap for their customers to place calls with long holding times to them. Bell Atlantic-New York contends that these arrangements, though not unlawful, can result in the carrier serving the ISP passing on to another carrier--usually the originating ILEC--the cost of transporting the virtual local call from the ISP's customer's local calling area to the area in which the ISP is physically located. For example, if a call is originated on Bell Atlantic-New York's network and directed to an ISP served by a CLEC, and the CLEC declines to provide Bell Atlantic-New York a point of interconnection (POI) within the originating local calling area, Bell Atlantic-New York must carry the call (and install the facilities needed to do so) to the local area in which the CLEC has a POI even though Bell Atlantic-New York "receiver only local usage rates from the originating end user and nothing at all from either the CLEC or the ISP. (Indeed, far from being compensated by the CLEC for transporting its call, [Bell Atlantic-New York] is actually required to pay the CLEC intercarrier compensation for the privilege of transporting its interexchange call for free, and is being prevented by the CLEC's numbering practices from being compensated by its end user through toll charges.)"[93]

To remedy the situation, Bell Atlantic-New York requests that all LECs be required to establish, upon the

[93] Bell Atlantic-New York's Initial Brief, p. 44 (emphasis in original). Bell Atlantic-New York adds that no such unfairness is imposed in the converse situation where a CLEC hands a call off to Bell Atlantic-New York for termination, inasmuch as Bell Atlantic-New York offers CLECs a POI at each of its switcher.

request of any interconnected LEC, a geographically relevant interconnection point (GRIP) in every rate center in which it assigns telephone numbers, unless the interconnecting carriers negotiate alternative arrangements. The requirement would apply to all interconnections; but Bell Atlantic-New York nonetheless considers it proper to consider the matter in this proceeding, inasmuch as the underlying problems typically arise in connection with delivery of ISP and other convergent traffic. The requirement could be fulfilled either by establishing an actual physical POI or by purchasing dedicated transport from Bell Atlantic-New York at approved rates, thereby avoiding the alleged need for CLECs to deploy uneconomic new transport facilities in order to satisfy the GRIP requirement.

NYSTA, perceiving a related problem. objects more generally to the use of virtual local numbers. In its view, they improperly convert what should be a toll call into a local call, thereby denying LECs and inter-exchange carriers the toll and access charges that would be associated with a toll call. NYSTA would regard the location of the end-user requesting the NXX code (and not, as in the GRIPs proposal, the location of the POI) as determining whether to treat the call as local or toll. CTSI et al. respond that the general matter of virtual NXX codes is beyond the ecopc *of* this proceeding and that, in any event, Bell Atlantic-New York has acknowledged that their use is lawful.

CPB objects to the GRIPs proposal on the grounds that it would require CLECs to undertake substantial investments in areas where they have few customers, frustrating the development of efficient CLEC networks. It nevertheless observes that Bell Atlantic-New York's underlying concern "appears valid,"[94] and it suggests a more efficient way to deal with it would be to allow Bell Atlantic-New York to charge a TELRIC-based per-mile fee for any additional trunking

[94] CPB's Initial Brief, p. 22.

costs Bell Atlantic-New York incurs to deliver the calls at issue to CLECs. Taking strikingly different views of CPB's position, AT&T responds by asserting that CPB joins it in regarding the GRIPs proposal as anti-competitive and inefficient; Bell Atlantic-New York says "the statutory representative of the State's consumers" recognizes the problem Bell Atlantic-New York raises and "offers a solution not inconsistent with [Bell Atlantic-Neu York's own] proposal."[95] It adds that the rates contemplated by CPB are tht interoffice transport rates set in the First Network Elements Proceeding.

Several CLECs object strenuously to both GRIPs and the mileage-fee alternative. Global NAPs sees them as efforts to undermine the pro-competitive regime established by the 1996 Act, which offsets the ILECs' market advantages by allowing CLECs to decide whether to interconnect at one point or many, denying that choice to the ILECs (meaning that an ILEC can be required to deliver all traffic to a single point designated by the CLEC), and forbidding an ILEC to charge a CLEC for the privilege of receiving its traffic. Meanwhile, Bell Atlantic-New York is obligated to daliver to a CLEC traffic originated by its own customers and directed to the CLEC's customers, and it cannot complain of the costs of doing so (though it is free, Global NAPs suggests, to charge its end-users a rate that covers those costs). Global NAPs (and other CLECs) add that the cost of transporting traffic is, in any event, modest; Bell Atlantic-New York acknowledges that transport costs are insensitive to distance but contends it incurs fixed costs in delivering the traffic over dedicated trunks.

[95] AT&T's Reply Brief, p. 11, Bell Atlantic-New York's Reply Brief, p. 21.

Frontier's Proposals[96]

1. Internet Traffic

Citing the flexibility afforded the states with regard to Internet traffic by the recent FCC decision and the absence of any "basis in law *or* policy to require ILECs to subsidize ISPs by allowing ISPs to water at the reciprocal compensation trough,"[97] Frontier proposer that there be no reciprocal compensation for traffic to ISPs on any network and that such traffic be handled on a bill-and-keep basis. Beyond that, it urges us to prohibit the discriminatory offering of discounted local exchange services to ISPs on the basis of their incoming traffic patterns as well as the discriminatory sharing of reciprocal compensation payments between carriers and ISPs.

Should we reject this primary proposal, Frontier would recommend compensation for Internet traffic priced at the ILECs "incremental (TELRIC) tandem switching cost."[98] As a further alternative, Frontier suggests that where tho incoming to outgoing traffic ratio is 2:1 *or* greater for three successive months, reciprocal compensation be reduced to the tandem switching rate (as defined in the preceding footnotel until the ratio has dropped below 2:1 for three successive months.

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[96] Relatively few parties respond specifically to Frontier, for the arguments directed at Bell Atlantic-New York's propoaals for the most part apply to Frontier's as well. Accordingly, no specific responses are reported in this section; but it should not be inferred that Frontier's proposals are unopposed.

[97] Frontier's Initial Brief, p. 8.

[98] As already suggested, Frontier seems to be referring here to the narrowly defined tandem switching cost itself. thereby intending to exclude the trunking, trunk port, and end office switch usage components of, for example, Bell Atlantic-New York's Meet Point B (tandem) rate; because of efficiencies of scale, per-unit tandem switch usage, so limited, is less costly than per-unit end-office switch usage. This accounts for Frontier's reference to tandem

2. Other Convergent Traffic

Refusing to concede as a legal matter that we are obligated to set reciprocal compensation rates for convergent traffic on the basis of the ILEC's costs, Frontier urges us to do so on the basis of the CLECs costs, reduced by the monthly revenues paid by the ISP to the CLEC for incoming traffic. (The premise of that reduction appears to be that the rates paid by a customer, including an ISP, are intended to cover both incoming and outgoing calling. Because an ISP imposes no costs related to outgoing traffic, the full amount of its payment defrays the termination costs that reciprocal compensation is also intended to cover.)

Should we nevertheless continue to use the ILEC's costs as the basis for reciprocal compensation, Frontier would set the rate at the ILEC's tandem switching costs (once again, as defined above), on the premise that when a CLEC terminates traffic to a convergent customer's platform, the CLEC switch is acting as a tandem: it receives traffic only from other switches and terminates the traffic using large trunk-side connections. Frontier regards these as the hallmarks of tandem, not end-office switching and it sees "no reason for the Commission to pretend that the CLEC is performing anything like the widely-distributed and far-flung end-office switching that the ILEC performs when terminating small volumes of traffic to the thousands of customers and large service territories served by most ILEC switches."[99]

Time Warner's Proposal

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cost as a lower rather than a higher figure; it portrays the higher alternative (analogous to Bell Atlantic-New York's Meet Point B rate) as "tandem switching plus local switching." (Frontier's Reply Brief, p. 1. See also Bell Atlantic-New York's Reply Brief, p. 11, n. 19.)

[99] Frontier's Initial Brief, pp. 10-11.

Time Warner regards the ideal to be a blended rate negotiated between the two carriers; by its very nature, a blended rate, which is adjusted downward as the CLEC's network evolves, fully accounts for that evolution and for traffic flows. Time Warner suggests that "the fact that a CLEC has accepted a blended rate provides solid evidence that it has adequately and responsibly built out its network in support of its originating traffic and the public switched network."[100]

Where a negotiated blended rate does not apply, Time Warner suggests a framework for dealing with convergent traffic that takes account of both the CLEC's network configuration and its traffic ratro. It distinguishes among CLEC networks on the basis of their points of interconnection with the ILEC, and, for each level, uses a different traffic ratio to determine whether the reciprocal compensation rate is to be at the tandem or at the lower, convergent traffic, rate.

CLECs at Level 1, new to a LATA, will have only a single point of interconnection (POI) and their traffic ratios will likely be out of balance even if they do not serve primarily convergent customers. Accordingly, reciprocal compensatron would be at the tandem rate for traffic within a 5:1 ratio; traffic above that ratio would be assumed to be convergent and the lower, convergent rate would apply. At Level 2, a CLEC would have three or four points of interconnection, and compensation for traffic exchanged at those POI's would be at the end-office rate. For traffic exchanged at tandems, the tandem rate would apply only where there was a traffic ratio less than 10:1; in other instances, the convergent rated would apply. Finally, where the CLEC has more than five points of interconnection (Level 3), the convergent rate would apply to traffic delivered at a tandem only when the traffic ratio exceeded 15:1. Time Warner suggests that the Level 2 and Level 3 arrangements would apply

[100] Time Warner's Initial Brief, p. 8 (footnote omitted).

relatively rarely, since in most of those instances the carriers would have negotiated a blended rate.

Time Warner asserts that its proposal is consistent with both state and federal law and with our goal of encouraging competition in the local exchange market. It reasons that we are free to determine that different proxy rates may apply to different network configurations, which may impose different costs. By taking into account traffic ratios and points of interconnection, Time Warner continues, its proposal "also promotes investment in facilities-based networks, which ultimately benefits consumers through increased real competition."[101] Time Warner stresses that it uses the traffic ratios not to directly infer information about traffic termination costs but only as a proxy to determine the likelihood chat convergent traffic exists. It recognizes the tentative nature of the traffic ratios and point-of-interconnection trigger points used in its proposal, and offers to participate in any forum we may wish to convene to reach consensus on modifications to its proposal.

Finally, Time Warner objects to any proposed reciprocal compensation .rate of zero, noting that carriers incur real costs when terminating any type of traffic.

In response, Bell Atlantic-New York "applaud[s] Time Warner's recognition that a problem exists,"[102] but says the proposal does little to alleviate it. In general, Bell Atlantic-New York believes the deployment of multiple interconnection points would not affect its showing that convergent traffic is less costly to deliver; specifically, it believes the number of interconnection points used by Time Warner is too low and its traffic exchange ratios too high.

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101 Time Warner's Initial Brief, p. 17.

102 Sell Atlantic-New York's Reply Brief, p. 18.

MCI's Proposal

Although MCI's primary position is to favor maintenance of the reciprocal compensation status quo, it suggests that extremely high traffic ratios could be used to trigger an audit, which would then determine whether tho CLEC's network configuration warranted allowing it to charge the tandem rate for reciprocal compensation. It suggests that a traffic imbalance exceeding 100:1 (Including all minutes exchanged, not just local minutes) could trigger such an audit.[103] MCI notes that thrs proposal would be consistent with the FCC's rule that allows a state commission to determine whether an individual CLEC is entitled to the tandem rate, taking account of economically relevant conslderacions -- primarily the geographic coverage of the CLECs svitch.[104] It would go NO further than this, however, in ascribing significance to traffic ratios.

Time Warner responds that MCI's proposal, like its own, uses traffic ratios as a trigger. But it believes the individual audits that would be triggered under MCI's proposal would create uncertainty and impose administrative burdens, while failing to facilitate low-cost competitive entry.

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103 MCI's Initial Brief, p. 5.

104 47 C.F.R. 551.711.

CPB's Proposal

CPB reaffirms that reciprocal compensation rates should be based on TELRIC and should be symmetrical. In its view, however, they also "should be deaveraged to reflect the significant differences in the underlying costs of terminating various types of traffic."[105] It cites record evidence[106] that termination of traffic to ISPs requires at most a single switch instead of the multiple switches required by tandem functionality and that, in such instances, tandem rate elements should not be applicable.

Because of the administrative burdens and costs of determining the functionality associated with the termination of costs to each customer or type of customer for each CLEC, CPB proposes, instead, what it characterizes as "a variant of the traffic flow imbalance approach proposed by [Bell Atlantic-New York] and implicit in questions posed by staff."[107] It suggests that where a carrier's incoming to outgoing traffic ratio exceeds some threshold, perhaps 5:1, reciprocal compensation would not be set on the basis of tandem functionality unless the carrier could show that it was providing tandem functionality notwithstanding its traffic ratio. CPB regards traffic imbalance as a suitable proxy for identifying tandem functionality because carriers having high traffic ratios "serve predominantly ISPs and other large volume customers, instead of a large number of geographically dispersed customers. Compensation received by such carriers should not include tandem rate elements."[108]

An importantly distinguishing feature of CPBs proposal is that it would not use traffic imbalance to

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105 CPB's Initial Brief, p. 17.

106 Ibid., p. 16, citing Tr. 199-200. See also Tr. 180, to the effect that CLECs commonly use a single-switch architecture.

107 CPB's Initial Brief, p. 18.

108 Id.

determine the reciprocal compensation rate until the ILEC's local market was fully open to competition. Only then, CPB reasons, will CLECs be able to attract a large volume of customers, including those who originate call to ISPs; and only then, therefore, will it be possible to infer the absence of tandem functionality from the existence of a traffic imbalance.

CPB urges as well that any new reciprocal Compensation arrangement be preceded by a transition period sufficient to prevent unnecessary disruption of CLECs' businesses and avoid penalizing them for having responded to incrntiver created by the previous regulatory structure. CPB suggests that the transition period could be as short as six months if the new arrangements were delayed until ILEC markets are fully open to competition; if tho change were made before markets are fully opened, the transition period should last at least one year. Stressing its unique status as a non-industry party, CPB maintains its proposal is fair to all concerned--CLECs, ILECs, customers originating calls, and customers receiving them.

As already noted, both ATCT and Bell Atlantic-New York stress the aspects of their respective positions that CPB appears to endorse.

DISCUSSION AND CONCLUSIONS

In General

In assessing the significance *of* the traffic imbalances that are so much at issue here, one must begin with the very basic point that reciprocal compensation was chosen over bill-and-keep in part because some imbalances were seen as likely. The ILECs' earlier advocacy *of* reciprocal compensation over bill-and-keep does not legally estop them from now urging changes in reciprocal compeneation, or even its total abandonment; but it does suggest at least that the existence of imbalances should not be seen by them as a complete surprise. Of course, the imbalances are greater than

those that were anticipated, clearly producing unexpectedly large flows of revenues in one direction, and the question is what, if anything, to do about it.

The parties have presented two related ways of looking at that question. The first emphasizes the economic soundness land legal requirement) that reciprocal compensation rates be grounded in costs and attempts to determine what, if anything, the traffic imbalances imply about those costs. The other point of view looks to the causes of the imbalances and attempts to assess their virtue: the ILECs accuse the CLECs of having found a way to game the system, and the CLECs protest that the ILECs' intransigence about opening mass markets has left them no choice but to pursue a profitable niche--either as an end in itself or as a means of gaining the strength needed to attempt full entry. The second type of analysis is related to the first; for when all is said and done, changes in rates can and should be made primarily with an eye to costs. But it maintains, nonetheless, that these decisions should take account of the players' motivations.

In this regard, CPB provides useful perspective in its presentation of the many factors underlying the traffic imbalances. CLECs have pursued ISP and other convergent traffic customers for multiple reasons: because reasonable and honest business plans might suggest doing so; because ILECs may not have opened mass markets as quickly and effectively as they might have: and because current reciprocal compensation arrangements may unintendedly overcompensate carriers that terminate calls to convergent customers. From the perspective of this proceeding, however, it is this last factor that is primary. We have no need to judge motives; and the ILECs' alacrity in opening markets is under review in other cases, What we must do here, simply, is to determine whether the current regulatory regime provides for reciprocal compensation at rates that fail to properly track costs, thereby skewing the market by creating unintended, uneconomic incentives to the pursuit of ISP and other convergent customers as a means

by which CLECs can draw above-cost revenues from ILECs.

The record as a whole suggests that the costs of serving a small number of large, convergent customers will likely be lower than the costs of serving a mass market. This is not to say that every CLEC with a traffic imbalance has, in fact, lower costs; much will depend on the configuration of the CLEC's network and the customer3 it is designed to serve (as distinct from those it aceually serves at a particular time). As a general rule, however, large convergent customers can be served via more efficient, higher capacity facilities. and those facilities will likely have less idle time. Bell Atlantic-New York correctly argues that "functional equivalence" does not require conclusively presuming that the costs of serving a small number of large customers located around a geographic area are no less than the costs of serving the mass market within that geographic area; notwithstanding AT&T's characterization of the standard as "geographic equivalence," it remains one of "functional equivalence," taking account, as Bell Atlantic-New York Suggests, of how the CLEC "serves" the area and not merely of the area's size.

This is not to say, of course, that each CLEC's costs must be examined. For good reason, the pertinent costs are those of the ILEC, unless the CLEC chooses to come in with a study showing it3 costs are higher. But if a CLEC's network is one that is not functionally equivalent to an ILEC's tandem, the law permits, and economic policy suggests, that the CLEC not be compensated at tandem rates. And there may be situations in which a traffic imbalance suggests an absence of tandem functionality.

In sum, the reciprocal compensation system is not fundamentally broken, but neither is it operating wholly satisfactorily. There is need for adjustment short of total overhaul, and the proposals in this proceeding should be assessed in that light.

Vertical Features

Bell Atlantic-New York's vertical features proposal makes considerable sense in the abstract: if these features are not used in terminating traffic, their costs should not be reflected in reciprocal compensation rates. Bell Atlantic-New York itself recognizes that the costs at issue cannot be measured until the conclusion of the Second Network Elements Proceeding and it therefore proposes a placeholder estimate of 30%. But it offers no support for that placeholder, and we see no basis for accepting it.

Accordingly, the proposal is rejected for now. It may be considered again at the conclusion of the Second Network Elements Proceeding, in which the costs associated with vertical features can be further considered. In addition, Bell Atlantic-New York may propose, in its compliance filing in this proceeding, a batter supported placeholder for immediate use in removing the costs of vertical features from reciprocal compensation rates. Other parties will be permitted to comment on any such proposal, and, if the support for the placeholder *is* persuasive, the rates will be adjusted accordingly.

Convergent Traffic

As already suggested, a significant traffic imbalance suggests a preponderance of convergent traffic. There may be, of course, other reasons for traffic imbalances, particularly in the case of relatively new CLECs: and the 2:1 traffic ratio proposed by Bell Atlantic-New York is not high enough to trigger remedial action. Once the ratio reaches 3:1, however, the inference of predominantly convergent traffic becomes stronger and, in turn, implies, without demonstrating conclusively, greater efficiency and lover costs in the termination *of* traffic. That inference of lower costs cannot be disregarded if compensation is to be cost-based; at the same time, it is not conclusive enough to have a definitive effect on rates.

An inference of this sort can be effectively handled

by a rebuttable presumption, in a manner similar to that suggested by CPB. If a carrier's incoming to outgoing traffic ratio exceeds 3:1 for the most recent three-month period, it is fair to presume that a substantial portion of its traffic is convergent, costing less to terminate, and that delivery of that traffic therefore should be compensated at end-office (in the Bell Atlantic-New York context, Meet Point A) rather than tandem (Meet Point B) rates. The end-office rate should apply to the portion of the traffic that exceeds the stated ratio, and the tandem rate should continue to apply to the portion of the traffic below that ratio. (In effect, the compensation would be at the blended rate characteristic of many interconnection agreements.)

The CLEC whose compensation is so adjusted will be permitted, however, to rebut the presumption with a suitable showing that its network and service are such as to warrant tandem-rate compensation for all traffic. Most of the factors to be considered in any such showing would go to the carrier's overall network design and take account of whether the network has tandem-like functionality that enables it to send, as well as receive, traffic. The network design factors to be considered include, but are not limited to:

- the number and capacity of central office switches;
- the number of points of interconnection offered to other local exchange carriers;
- the number of collocation cages;
- the presence of SONET rings and other types of transport facilities;
- the presence of local distribution facilities such as coaxial cable and/or unbundled loops.

The presence of some or all of these network components in substantial quantities would demonstrate that the carrier in question was investing in a network with tandem-like functionality, designed to both send and receive

customer traffic. Multiple interconnection points, collocation cages, SONET rings and other types of transport facilities in various combinations are all evidence of a network being built out to reach a dispersed customer base. collocation cages along with the use of unbundled loops are a clear indication the carrier intends to serve residential and small business customers. The presence of the network design features would be more important than actual numbers of residential and business customers served given the newness of the competitive local exchange market.

If a carrier subject to the presumption succeeds in rebutting it, the compensation paid to the carrier will revert to its previous, higher, level. In addition, the carrier will be made whole for the difference between the higher and lower compensation rates *for* the interval going back to its filing of its rebuttal presentation. These arrangements should be set forth in all tariffs that contain reciprocal compensation provisions.

ISP Traffic

Even if the FCC ISP Ruling affords us the discretion to adopt either of Bell Atlantic-New York's proposals, we see no sound reason to treat ISP traffic differently from other convergent traffic. For one thing, the FCC ISP Ruling is not the FCC's last word on the subject, and a regulatory regime based on it might have to be changed yet again before too long. More substantively, Bell Atlantic-New York has shown no reason to treat ISP traffic differently from other convergent traffic, and its specific proposals are similarly unsupportable. To deny a11 compensation for ISP termination would be to unfairly ignore the indisputable fact that CLECs completing these calls incur costs in doing so: and even if ISPs in concept resemble interexchange carriers that should recover their costs through carrier access charges, current federal law prevents them from doing so. Meanwhile, Bell Atlantic-New York's direct variable cost proposal, though I

harsh, is poorly supported. There appears to be no reason to abandon TELRIC costing in this context, and the rebuttable presumption regime adopted for Convergent traffic in general can address any legitimate concerns associated with ISP traffic. At the same time, it would be wrong to exempt ISP traffic from this remedy to promote Internet access, as the Attorney General may be suggesting. For all these reasons, no special reciprocal cornpensation rates will be set for Internet-bound traffic; it will be treated the same as other convergent traffic (i.e., in accordance with the remedy adopted under the preceding heading).

GRIPs

NYSTA's broad concern related to virtual NXX codes goes beyond the scope of this proceeding and need not be considered further. Bell Atlantic-New York's more limited proposal, to require CLECs to establish GRIPs or else reimburse Bell Atlantic-New York for the cost of hauling traffic from the virtual NXX to the interconnection point, is properly within the proceeding, for it bears directly on reciprocal compensation levels.

On its face, Bell Atlantic-New York makes a good case for the fairness of its proposal, which is designed to spare it the cost of, in effect, subsidizing a CLEC's use of virtual NXXs. The CLECs respond that federal law gives them, for good pro-competitive reasons, considerable discretion with regard to selecting points of interconnection and requires the originating carrier to bear the cost of hauling traffic to the point of interconnection. But while federal law likely affords us more discretion here than the CLECs say,[109] there appears to be no need to superimpose a GRIPS-type remedy on

[109] For example, the FCC has sard that "a requesting carrier that wished a 'technically feasible' but expensive interconnection would . . . be required to bear the cost of that interconnection, including a reasonable profit." (Local Competition Order ¶199.)

the convergent traffic remedy already adopted. Any additional benefits to Bell Atlantic-New York would be relatively minor, and the unintended effects on access to the Internet from remote areas could be substantial. The GRIPs proposal therefore will be rejected, at least for now, Chough at may be raised agaan an the Second Network Elements Proceedrng.

Time Warner's Proposal

Time Warner's proposal, though creative, would require considerably more elaboration and refinement before its adoption could be considered. (Time Warner itself seems to recognize as much in its offer to participate in further forums regarding the proposal.) It appears, however, that those additional efforts are unnecessary, inasmuch as the course of action we are taking here adequately deals with the deficiencies identified in the existing reciprocal compensation regime. Accordingly, Time Warner's proposal will not be further pursued at this time.

Implementation

CPB suggests deferring any action until we are satisfied that local markets have been fully opened to competition, but there appears to bo no need to impose any such condition on a remedy growing out of an immediate concern. Bell Atlantic-New York's opening of its market, of course, is under review in Case 97-C-0271, which provides adequate oversight of the matter, and Frontier's actions likewise are being considered in other proceedings.

The need for a transition period, advocated by most CLECs, also is questionable at best. Carriers have been on notice at least since this case began that changes might be in the offing, and those changes can take effect without any further transition period.

Finally, we emphasize that the decisions reached in this proceeding do not modify the terms of existing contracts except to the extent those contracts, by their own terms,